No. 09-604

Supreme Court, U.S.
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In the Supreme Court of the United States

VINCE VINHTUONG NGUYEN, *Petitioner,*

v.

CALIFORNIA, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
GERALD A. ENGLER
Senior Assistant Attorney General
DONALD E. DE NICOLA
Deputy State Solicitor General
RENÉ A. CHACÓN
Supervising Deputy Attorney General
LAURENCE K. SULLIVAN
Supervising Deputy Attorney General
Counsel of Record
ERIC D. SHARE
Deputy Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5849
Fax: (415) 703-1234
Counsel for Respondent

QUESTION PRESENTED

California's Three Strikes law increases the prison terms of felons with one or more prior convictions for "serious" or "violent" felonies—commonly known as strikes. Strikes include specifically defined adjudications of wardship based on such felonies, when committed by a minor sixteen years or older found fit for proceedings under juvenile court law, which does not afford the right to a jury trial. See Cal. Penal Code §§ 667(d)(3), 1170.12(b)(3). Prior juvenile wardship adjudications of strikes are considered prior convictions, which must be alleged in the charging document, and the defendant has a right to a jury determination that the prosecution has proved the prior strike beyond a reasonable doubt. See Cal. Penal Code §§ 667(c), 1025, 1158, 1170.12(d)(1).

The question presented is whether the respective jury-trial and due-process guarantees of the Sixth and Fourteenth Amendments preclude the use of such a prior juvenile wardship adjudication to increase punishment for a new felony in a California Three Strikes prosecution.

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RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional provisions involved in this case are the Sixth and Fourteenth Amendments to the United States Constitution.

California's Three Strikes law (Cal. Penal Code §§ 667(b)-(i), 1170.12)[1] provides in part:

> (3) A prior juvenile adjudication shall constitute a prior felony conviction for purposes of sentence enhancement if:
>
> (A) The juvenile was sixteen years or older at the time he or she committed the prior offense.
>
> (B) The prior offense is listed in subdivision (b) of Section 707 of the Welfare and Institutions Code or described in paragraph (1) or (2) as a felony.
>
> (C) The juvenile was found to be a fit and proper subject to be dealt with under the juvenile court law.
>
> (D) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code.

§ 667(d); see also *id.* § 1170.12(b) (same).

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[1] Unless otherwise designated, further statutory references are to the California Penal Code.

Section 1025 provides in part:

> (b) Except as provided in subdivision (c), the question whether or not the defendant has suffered the prior conviction shall be tried by the jury that tries the issue upon the plea of not guilty, or in the case of a plea of guilty or nolo contendere, by a jury impaneled for that purpose, or by the court if a jury is waived.
>
> (c) Notwithstanding the provisions of subdivision (b), the question of whether the defendant is the person who has suffered the prior conviction shall be tried by the court without a jury.

Section 1158 provides in part:

> Whenever the fact of a previous conviction of another offense is charged in an accusatory pleading, and the defendant is found guilty of the offense with which he is charged, the jury, or the judge if a jury trial is waived, must unless the answer of the defendant admits such previous conviction, find whether or not he has suffered such previous conviction.

STATEMENT OF THE CASE

1. In December 2004, petitioner, twenty-one years old, was charged with possession of a firearm by a felon (§ 12022.1(a)(1)), possession of ammunition by a felon (§ 12316(b)(1)), possession of a billy (§ 12020(a)(1)), and possession of methamphetamine (Cal. Health & Safety Code § 11377(a)), together with two misdemeanors of being under the influence of a controlled substance and possessing a drug device

(Cal. Health & Safety Code §§ 11550, 11364). Pursuant to California's Three Strikes law (§§ 667(b)-(i), 1170.12), the complaint also alleged, as a qualifying "prior felony conviction" (§§ 667(d)(3), 1170.12(b)(3)), a 1999 juvenile wardship adjudication for assault with a deadly weapon (§ 245(a)(1)) when petitioner was sixteen years of age or older. Clerk's Transcript (C.T.) 6-8.

In March 2005, petitioner pleaded no contest to a felony violation of felon in possession of a firearm and to misdemeanor possession of a billy, in exchange for dismissal of the other charges. C.T. 13. The underlying facts of the current crimes are not described in the record. Petitioner waived his statutory right to a jury trial on the issue of whether he "[h]ad suffered" the prior strike (§§ 1025(a)-(b), 1158). Based upon the record of the 1999 juvenile adjudication, which indicated that petitioner had admitted the assault with a deadly weapon (C.T. 14), the court found the prior strike proven. *People* v. *Nguyen*, 46 Cal. 4th 1007, 1013, 209 P.3d 946, 949 (2009) (*Nguyen*).[2]

Over petitioner's objection that the use of the juvenile adjudication to increase his sentence violated his Sixth Amendment right to a jury trial, the court imposed a sixteen-month prison term for the firearm conviction, and doubled it to thirty-two months under the two-strike-offender part of the

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[2] The documents submitted to the California Superior Court to prove the prior juvenile adjudication were not made part of the appellate record and were lost. Acting on its own motion, the California Court of Appeal took judicial notice of the juvenile court file. See *Nguyen*, 46 Cal. 4th at 1013, n.4, 209 P.3d at 949, n.4.

Three Strikes law (§§ 667(e)(1), 1170.12(c)(1)). C.T. 22; Reporter's Transcript 16-17.

2. A divided panel of the California Court of Appeal, Sixth Appellate District, reversed. It held that, because juveniles lack a jury-trial right, the use of a juvenile adjudication for recidivism punishment under the Three Strikes law violates the Sixth Amendment. See *Nguyen*, 46 Cal. 4th at 1014, 209 P.3d at 950.

3. On July 2, 2009, the California Supreme Court reversed. The supreme court held that the use of a prior juvenile wardship adjudication as a strike did not violate petitioner's constitutional rights. *Nguyen*, 46 Cal. 4th at 1010, 209 P.3d at 947. The California Supreme Court held that petitioner's sentence did not violate his jury-trial right under the Sixth Amendment, as interpreted by this Court in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000) (*Apprendi*). The state supreme court noted that petitioner had the right under California law to have a jury determine the truth of the fact used to increase his sentence, i.e., the prior juvenile wardship adjudication, and that petitioner had waived his jury-trial right on the sentencing fact in this case. The California Supreme Court further held no Sixth Amendment violation occurs when a constitutionally valid prior adjudication of criminal conduct, including a juvenile wardship adjudication, is used as evidence of recidivism. *Nguyen*, 46 Cal. 4th at 1012, 209 P.3d at 949. On August 19, 2009, the California Supreme Court denied rehearing.

REASONS FOR DENYING THE PETITION

I. BECAUSE PETITIONER WAS ENTITLED TO, BUT WAIVED, HIS STATUTORY RIGHT TO A JURY TRIAL ON THE PRIOR JUVENILE WARDSHIP ADJUDICATION, THIS CASE DOES NOT IMPLICATE *APPRENDI* v. *NEW JERSEY*, 530 U.S. 466 (2000)

1. Citing *Apprendi*, 530 U.S. 466, petitioner asserts that the increase of his sentence based on a nonjury juvenile wardship adjudication violates the Sixth Amendment. Petitioner's argument disregards both his California statutory right to a jury trial on the fact of his juvenile wardship adjudication and his waiver of that jury-trial right. Because *Apprendi* is not implicated when a defendant waives a statutory jury-trial right on a fact used to enhance a sentence above the maximum, certiorari is unwarranted.[3]

2. *Apprendi* held: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. *Blakely* v. *Washington*, 542 U.S. 296 (2004) (*Blakely*), explained that "the 'statutory maximum' for

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[3] Since *Nguyen* was decided, this Court has denied petitions for certiorari in several cases raising *Apprendi* challenges to California's use of juvenile wardship adjudications as strikes. See *Alonzo Hale* v. *California*, No. 09-6394, *cert. denied* Jan. 11, 2010; *Deante Dekhoura Stewart* v. *California*, No. 09-7287, *cert. denied* Jan. 11, 2010; and *Charles Gordon* v. *California*, No. 09-6422, *cert. denied* Oct. 20, 2009. As noted in *Nguyen*, prior to the California Supreme Court's decision, this Court had denied petitions for certiorari in numerous California cases finding no constitutional violation in using juvenile adjudications as strikes. See *Nguyen*, 46 Cal. 4th at 1020, 209 P.3d at 954 (and cases cited therein).

Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Id.* at 303. *Blakely* reaffirmed *Apprendi*'s holding that a trial court may make factual determinations to select a sentence within the applicable sentencing range that does not exceed the statutory maximum. *Apprendi*, 530 U.S. at 481; *Blakely*, 542 U.S. at 309.

3. A prior conviction under the Three Strikes law must be pleaded and proved beyond a reasonable doubt under California law. §§ 667(c), 1170.12(d)(1); see also *People* v. *Monge*, 16 Cal. 4th 826, 833-34, 941 P.2d 1121, 1126 (1997) (burden of proof is beyond a reasonable doubt). Further, California provides a statutory right to a jury trial when a prior conviction is alleged:

> [T]he question of whether or not the defendant has suffered the prior conviction shall be tried by the jury that tries the issue upon the plea of not guilty, or in the case of a plea of guilty or nolo contendere, by a jury impaneled for that purpose, or by the court if a jury is waived.

§ 1025(b); see also § 1158, *Nguyen*, 46 Cal. 4th at 1011, 209 P.3d at 948. These facets of state law establish—contrary to petitioner's argument—that the *Apprendi* rule is not implicated in petitioner's case.

> *Apprendi* requires, at most, the right to a jury trial in the current criminal proceeding with respect to any sentencing fact that may increase the maximum punishment for the underlying conviction. California's statutory law afforded defendant the right to have a jury

> determine the existence of the sentencing fact here at issue—whether he suffered a "prior felony conviction" as defined by the Three Strikes law . . . .

Nguyen, 46 Cal. 4th at 1012, 209 P.3d at 949.

4. Petitioner dismisses his California jury-trial right, arguing incorrectly that *Apprendi* demands a jury determine *his guilt of the underlying offense, not the fact of a prior conviction*, before a prior juvenile adjudication can be used as a strike. Pet. at 27. Petitioner mistakenly views his prior *felonious conduct*, not his status as one who has suffered a wardship adjudication for a serious or violent felony, as the fact that must be proved beyond a reasonable doubt in order for his sentence to be increased for recidivism. See Pet. at 26-27.

His argument misconstrues California's Three Strikes law. The law makes the *juvenile adjudication itself*—not the conduct underlying the adjudication—the recidivist fact that increases a sentence. See § 667(c) (Three Strikes law is applicable if a defendant has "one or more prior felony convictions"); *id.* § 667(d)(3) ("A prior juvenile adjudication shall constitute a prior felony conviction" under specified circumstances); see also § 1170.12(a), (b)(3) (same). The California Supreme Court makes the point clearly:

> [U]nder *Apprendi*, any "fact" that allows enhancement of an adult defendant's maximum sentence *for the current offense* must, unless the defendant waives his jury-trial-right, be determined by a jury *in the current case.*
>
> Defendant's claim, of course, does not come within this express holding. The

> statutory relevant sentencing "fact" in this case is whether defendant's record includes a prior adjudication of criminal conduct that qualifies, under the Three Strikes law, as a basis for enhancing his current sentence. Aside from any exception that might apply here, the literal *rule* of *Apprendi* thus required only that a jury in the current proceeding determine the existence of such an alleged prior adjudication.
>
> California statutory law afforded defendant precisely this right. Whenever, for purposes of enhancing the sentence on the current charges, the prosecution alleges a prior conviction sustained by the defendant, and the defendant disputes the allegation, the question whether he or she "has suffered" the prior conviction must, unless a jury is waived, be submitted to a jury in the current proceeding. (§§ 1025, subds. (a), (b), 1158.) This jury-trial requirement would extend, of course, to a prior juvenile adjudication included within the Three Strikes law's definition of a "prior felony conviction."

Nguyen, 46 Cal. 4th at 1015, 209 P.3d at 950-51.

5. Under sections 1025 and 1158 petitioner had the right to demand that a jury determine the fact of a prior conviction beyond a reasonable doubt. But petitioner *waived* the right to have the jury determine the 1999 juvenile adjudication. *Nguyen*, 46 Cal. 4th at 1012, 209 P.3d at 949 ("California statutory law afforded defendant the right to have a jury determine the existence of the sentencing fact here at issue-whether he suffered a 'prior felony

conviction' as defined by the Three Strikes Law-but he waived that right"); *id.* at 1015, 209 P.3d at 951 ("defendant expressly waived his right to a jury trial in the current proceeding on the issue whether he had suffered the alleged prior, and he agreed to submit that issue to the court"). Because petitioner did not admit the allegation that he suffered a prior conviction and only waived his jury-trial right, he necessarily agreed to the court determining the truth of the fact used to enhance his sentence. For this reason, among others, *Apprendi* is not implicated and does not bar petitioner's Three Strikes sentence.

6. This case presents no occasion to consider under *Apprendi* the scope of the jury-trial right afforded by sections 1025 and 1158. The California Supreme Court declined to address that issue since petitioner did not preserve it. See *Nguyen*, 46 Cal. 4th at 1015, n.8, 209 P.3d at 951, n.8 (petitioner's failure to challenge the adequacy of section 1025 to protect his *Apprendi* rights forfeited the claim). The State was not asked to defend against a claim that its statutes inadequately protect *Apprendi* rights of criminal defendants with prior convictions. Because there is no judgment on that issue, the contention cannot be addressed in this case.

The relevant judgment, as explained by the California Supreme Court, is that the Three Strikes law does not impinge *Apprendi* rights given California's statutory jury-trial right afforded to criminal defendants and that petitioner waived his jury-trial right on the truth of his prior wardship adjudication in this case. Neither of the California Supreme Court's judgments on those points merits review by this Court.

II. A JUVENILE WARDSHIP ADJUDICATION FOR A SERIOUS OR VIOLENT FELONY IS CONSTITUTIONALLY VALID PROOF OF RECIDIVISM

1. Even if California had not provided petitioner a jury-trial right on the truth of his prior-conviction allegation, petitioner's *Apprendi* claim would fail. The California Supreme Court correctly found that juvenile wardship adjudications fall within *Apprendi*'s exception for "prior convictions."

> [W]e find nothing in the *Apprendi* line of cases, or in other Supreme Court jurisprudence that interferes, under the circumstances here presented, with what the high court deemed a sentencing court's traditional authority to impose increased punishment on the basis of the defendant's recidivism. That authority may properly be exercised, we conclude, when the recidivism is evidenced, as here, by a *constitutionally valid* prior adjudication of criminal conduct.

Nguyen, 46 Cal. 4th at 1012, 209 P.3d at 949. That conclusion is correct and fully consistent with this Court's jurisprudence.

2. The fact of a prior conviction is exempted from the principle that facts used to increase a defendant's sentence beyond the statutory maximum provided for the offense must be found by a jury or admitted by the defendant. *Apprendi*, 530 U.S. at 490. *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998) (*Almendarez-Torres*), viewed prior convictions as essentially unique in this respect. The Court reasoned "that the relevant subject matter is recidivism. That subject matter—the prior commission of a serious crime—is as typical a

sentencing factor as one might imagine." *Id.* at 230; see also *id.* at 243.

3. Contrary to petitioner's argument, *Jones* v. *United States*, 526 U.S. 227 (1999) (*Jones*), does not support his claim that *Apprendi* impliedly bars the use of juvenile adjudications as evidence of recidivism. See Pet. at 12. *Jones* cited *Almendarez-Torres* to observe that "[t]he Court's repeated emphasis on the distinctive significance of recidivism leaves no question that it regards that fact as potentially distinguishable for constitutional purposes from other facts that might extend the range of possible sentencing." *Jones*, 526 U.S. at 249. *Jones* observed that "[o]ne basis for the possible constitutional distinctiveness [of recidivism] is not hard to see: unlike virtually any other consideration used to enlarge the possible penalty for an offense . . . a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." *Id.*

Jones did not thereby define the judicial proceedings whose judgments constitute the fact of a prior conviction. Nor did it limit the kinds of trial proceedings that competently prove recidivism. Instead, it identified one basis, among others, for "justif[ying] the single exception [this Court] consistently recognizes to the rule that a jury must find sentencing facts which increase the maximum punishment—the exception for the 'fact of a prior conviction.' [Citations.]" *Nguyen*, 46 Cal. 4th at 1016, 209 P.3d at 951. Taking *Jones*' reference to the jury-trial guarantee out of context ignores the Court's repeated emphasis on the distinctive nature of recidivism as a traditional basis for increasing a defendant's punishment. Indeed, *Jones* itself was not a case involving enhancement of a sentence based on a prior conviction. Instead, it concerned a statute

that provided for increased punishment depending on the severity of the victim's injuries. *Jones*, 526 U.S. at 229. Thus, the *Jones* dicta is not controlling.

Apprendi deemed it unnecessary to revisit *Almendarez-Torres*, and the Court retained the jury-trial exception for recidivism. "Both the certainty that procedural safeguards attached to any 'fact' of prior conviction, and the reality that *Almendarez-Torres* did not challenge the accuracy of that 'fact' in his case, mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a 'fact' increasing punishment beyond the maximum statutory range." *Apprendi*, 530 U.S. at 488.

Apprendi, like *Jones*, did not involve the use of a prior conviction to enhance a sentence. It concerned a hate-crimes statute that extended the sentence if a crime had been committed "with the purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation, or ethnicity." *Apprendi*, 530 U.S. at 469. This Court distinguished that law from the one in *Almendarez-Torres*: "The reasons supporting an exception from the general rule for the statute construed in [*Almendarez-Torres*] do not apply to the New Jersey statute [in *Apprendi*]. Whereas recidivism 'does not relate to the commission of the offense' itself, [*Almendarez-Torres*,] 523 U.S. at 230, 244, New Jersey's biased purpose inquiry goes precisely to what happened in the 'commission of the offense.'" *Apprendi*, 530 U.S. at 496.

4. Petitioner infers from those decisions that recidivism may increase the maximum sentence *only* if past criminal conduct is found by a jury in the current proceeding or was found by a jury in a prior proceeding. As the California Supreme Court explained, however, that is not a fair reading of this

Court's decisions. This Court, it noted, has confirmed that minors are entitled to many procedural rights and protections they would enjoy as adult criminal defendants (*In re Gault*, 387 U.S. 1 (1966); *In re Winship*, 397 U.S. 358 (1970)), but the Constitution does not require the right to a jury trial in juvenile proceedings (*McKeiver* v. *Pennsylvania*, 403 U.S. 528 (1971) (*McKeiver*). See *Nguyen*, 46 Cal. 4th at 1019, 209 P.3d at 953. *McKeiver* "made clear that the absence of a right to a trial by jury did not appreciably undermine the accuracy of the factfinding function in juvenile cases. (*McKeiver*, *supra*, at p. 543 (plur. opn. of Blackmun, J.); *id.* at p. 551 (conc. opn. of White, J.).)" *Nguyen*, 46 Cal. 4th at 1023, 209 P.3d at 956.

Jones and *Apprendi* note the importance of procedural safeguards in explaining the exception for prior convictions. But neither case held that a jury-trial right is the *sine qua non* of those safeguards. *Jones*, 526 U.S. at 249; *Apprendi*, 530 U.S. at 488. In *McKeiver*, this Court held that a minor's constitutional rights are ensured in juvenile court even though there is no jury-trial right. *McKeiver*, 403 U.S. at 543, 551. It is incongruous to conclude that a juvenile adjudication is constitutionally sound without the right to a jury in a current proceeding, but constitutionally unsound as proof of recidivism in a later proceeding.

Juvenile wardship proceedings are constitutionally valid adjudications of criminal activity. Therefore, the California Supreme Court properly concluded that this Court's decisions do not limit the prior-conviction exception to judgments in proceedings encompassing a jury-trial right.

> We do not read the passages from *Almendarez-Torres* . . . , *Jones* . . . , and *Apprendi* . . . as prohibiting the use of

> previously adjudicated criminal misconduct to authorize an increased sentence in a later criminal case unless the prior proceeding—whether juvenile or adult—specifically included the right to a jury trial. . . .
>
> We first note the obvious: Neither *Jones* nor *Apprendi* was directly concerned with deciding the circumstances under which prior adjudications of criminal conduct may be used to enhance the maximum sentence for a subsequent adult offense. Hence, the court's comments on that subject were dictum.
>
> Moreover, nothing in *Jones* or *Apprendi*, or in *Almendarez-Torres* itself, stated or implied that a prior criminal adjudication forming the basis of a "recidivism" sentencing factor in an adult criminal proceeding must always have been obtained in a proceeding that included, in particular, the right to a jury trial. Those cases cited a group of procedural rights and safeguards that make prior adult convictions fair and reliable evidence of previous criminal misconduct, but they did not state that each and every one of those guarantees or any one of them in particular, is essential to the availability of a prior criminal adjudication to furnish such proof.
>
> Finally, . . . *Apprendi* and its progeny concern an *adult's* right to jury findings, in the adult case, of all previously unadjudicated facts that bear upon the maximum sentence for the adult offense.

> On the other hand, these decisions have suggested that recidivism already adjudicated in fair and reliable prior proceedings may be used to enhance later sentences without new jury involvement, and the high court has not disturbed *McKeiver*'s determination that juvenile adjudications of criminality are constitutionally fair and reliable even though the Constitution does not require jury trial in juvenile proceedings.
>
> Under these circumstances, we decline to hold that a prior juvenile adjudication, highly probative on the issue of recidivism, is unavailable to enhance the punishment for the individual's subsequent adult offenses, for the sole reason that there was no right to a jury trial in the juvenile case.

Nguyen, 46 Cal. 4th at 1023-24, 209 P.3d at 956-58.[4]

5. Petitioner asserts that "[p]ermitting an increased maximum sentence based upon a juryless juvenile adjudication diminishes and erodes the jury's function because it authorizes past findings to

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[4] See also *id.* at 1023, 209 P.3d at 956:

> So long as an accused adult is accorded his right to a jury trial in the adult proceeding as to all the facts that influence the maximum permissible sentence, no reason appears why a constitutionally reliable adjudication of criminality, obtained pursuant to all procedural guarantees constitutionally due to the offender in the prior proceeding—specifically including the right to proof beyond a reasonable doubt—should not also be among the facts available for that sentencing purpose.

be labeled as 'convictions' as long as the legislature doesn't stray 'too far' from what looks like a criminal conviction. [Citation.]" Pet. at 12. Juryless adjudications in juvenile delinquency proceedings do not violate the Sixth Amendment. *McKeiver*, 403 U.S. at 545, 557. In criminal court, petitioner had and waived a jury-trial right on the truth of the prior adjudicated fact used to increase his sentence. See §§ 1025, 1158. Moreover, juvenile adjudications fall within the *Almendarez-Torres* exception for prior convictions. "The Three Strikes law's use of juvenile adjudications affects only the length of the sentence imposed on an adult offender, not the finding of guilt in the adult court nor the adjudication process in juvenile court." *People* v. *Fowler*, 72 Cal. App. 4th 581, 586 (1999). Recognition that juvenile wardship adjudications are valid evidence of recidivism does not denigrate Sixth Amendment protections. Petitioner was not deprived of Sixth Amendment rights in either the juvenile court or the criminal court.[5]

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[5] While directing his aim at wardship adjudications that prove recidivism, petitioner targets much more. He invites the Court to overrule *Almendarez-Torres*. Pet. at 14, n.11 ("to the extent that this Court wishes to use this case as a vehicle for reconsidering *Almendarez-Torres*, the validity of that decision could be considered 'fairly encompassed' within the question presented"). He also questions *McKeiver*. See Pet. at 25 ("commentators" believe that "juvenile proceedings may not be as reliable as adult criminal proceedings and that it is easier for prosecutors to obtain juvenile adjudications than criminal convictions").

In the California Supreme Court petitioner disclaimed that his argument required overruling or reconsidering either *Almendarez-Torres* or *McKeiver*. See Appellant's Answer Brief on the Merits at 6-7 (arguing that juvenile wardship adjudications fall outside the *Almendarez-Torres* exception); *id.* at 27 ("Appellant is not arguing that juveniles are entitled to

(continued...)

6. Petitioner asserts that the judgment below would allow any adjudication—even school suspensions—to enhance a sentence so long as the adjudication was "reliable." Pet. at 12; see also Pet. at 21-23. This grossly overstates the decision in *Nguyen*. It did not adopt any "reliability" test. To the contrary, it holds that a "sentencing court's traditional authority to impose increased punishment on the basis of the defendant's recidivism . . . may properly be exercised . . . when the recidivism is evidenced, as here, by a *constitutionally valid* prior adjudication of criminal conduct." *Nguyen*, 46 Cal. 4th at 1012, 209 P.3d at 949. Juvenile adjudications are valid evidence of recidivism not just because they are "valid, fair, and reliable" (see *Nguyen*, 46 Cal. 4th at 1019; 209 P.3d at 953), but because they are judgments in constitutionally valid judicial proceedings (see *McKeiver*, 403 U.S. 528) in which minors are adjudicated wards based on their commission of criminal conduct and, on that basis, properly may be subjected to loss of liberty (see *Nguyen*, 46 Cal. 4th at 1019, 209 P.3d at 953 (juvenile proceedings include all the constitutional protections applicable to such matters)). If juryless trials in juvenile court abridged fundamental constitutional rights, this Court would not have sanctioned them.

7. Acceptance of petitioner's argument that juryless adjudications are incompetent evidence of recidivism under the Sixth Amendment would have profound and unacceptable consequences to the

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(...continued)
jury trials"). Thus, this case presents no opportunity to reconsider either decision. Cf. Supreme Court Rule 10 ("A petition for a writ of certiorari will be granted only for compelling reasons").

criminal justice system aside from barring the use of prior juvenile adjudications to enhance criminal sentences. Seemingly, it would invalidate as evidence of recidivism *any* adjudicated finding of criminal conduct reached in a proceeding where the defendant lacked a constitutional jury-trial right. That would prohibit the use of a juryless misdemeanor prior conviction to enhance the punishment for a later offense, thus undermining prototypical state recidivism schemes for offenses like driving under the influence with a prior adjudication for the same offense. See, *e.g.*, *People* v. *Palmer*, 142 Cal. App. 4th 724, 734 (2006) (upholding use of a Nevada juryless-misdemeanor conviction of driving under the influence to enhance a California drunk-driving offense). That result would require this Court to overrule *Nichols* v. *United States*, 511 U.S. 738 (1994), which held that a prior constitutionally valid uncounseled misdemeanor conviction can be used in a subsequent federal felony proceeding to increase a defendant's criminal history score, and thus the maximum punishment, for a felony offense. *Id.* at 747-48, overruling *Baldasar* v. *Illinois*, 446 U.S. 222 (1980).

Nguyen correctly analyzed this Court's precedents and found no legitimate basis for excluding juvenile adjudications from the category of "prior convictions" exempted from the *Apprendi* rule.

III. No Significant Conflict of Decisions Exists, Nor Would Certiorari in this Case Resolve Any Residual Case-law Tensions

1. Petitioner asserts that considerable disagreement in lower courts exists on the use of juvenile adjudications as evidence of recidivism and that the issue should be resolved in a California case

because of the preeminent influence of the state supreme court. Pet. at 7. Petitioner's thesis vastly overstates any lower-court conflict. After *Apprendi*, various federal circuit and state supreme courts addressed the use of prior juvenile adjudications as sentencing factors in criminal cases. The overwhelming majority of those courts have concluded that nonjury juvenile adjudications fall within the *Almendarez-Torres* exception to *Apprendi*'s Sixth Amendment jury-trial right. Moreover, to the extent any conflict of decisions among lower courts exists, certiorari here is unlikely to resolve it. California law is distinct from the laws considered by the lower federal courts and state supreme courts. Specifically, California grants the defendant a jury trial in the current proceeding to decide the allegation of a prior juvenile adjudication before the court can use it to enhance a sentence above the statutory maximum. See §§ 1025, 1158.

2. In *Nguyen*, the California Supreme Court surveyed cases from other states and the federal circuit courts in analyzing the issue. It correctly found that the overwhelming majority of other jurisdictions reject claims that the Sixth Amendment—and *Apprendi*—bar the use of nonjury-juvenile adjudications as evidence of recidivism. The *Nguyen* court summarized the rationale of the majority decisions.

> Prior juvenile adjudications substantially satisfy all the reasons set forth in *Almendarez-Torres*, *Jones*, and *Apprendi* why prior convictions may be employed to increase the maximum punishment for a subsequent adult offense without the need for jury findings in the later case. Like prior adult criminal convictions, such prior juvenile judgments do not involve facts

about the current offense that were withheld from a jury in the current case, but instead concern the defendant's *recidivism*—i.e., his or her status as a *repeat offender*—a basis on which courts, acting without juries, traditionally have imposed harsher sentences. Moreover, the prior criminal misconduct establishing this recidivism was previously and reliably adjudicated in proceedings that included all the procedural protections the Constitution requires *for such proceedings*—indeed, every substantial safeguard required in an adult criminal trial except the right to a jury. Use of such reliably obtained juvenile judgments of prior criminality to enhance later adult sentences does not offend an *adult defendant's* constitutional right to a jury trial in an adult criminal proceeding. Conversely, it makes little sense to conclude, under *Apprendi*, that a judgment of juvenile criminality which the Constitution deemed fair and reliable enough, when rendered, to justify confinement of the minor in a correctional institution is nonetheless constitutionally inadequate for later use to establish the same individual's recidivism as the basis for an enhanced adult sentence. Such a determination would preclude a rational and probative basis for increasing an adult offender's sentence—that he or she was not deterred from criminal behavior by a youthful brush with the law—unless juveniles were afforded a right to a jury

> trial, *which the Constitution does not require.*

Nguyen, 46 Cal. 4th at 1021-22, 209 P.3d at 955.

3. The Ninth Circuit is the only federal circuit court to disapprove the use of juvenile adjudications as proof of recidivism in light of *Apprendi*. Concluding that juvenile adjudications fall outside the *Almendarez-Torres* exception for prior convictions, a divided panel in *United States* v. *Tighe*, 266 F.3d 1187 (9th Cir. 2001), relied on the dicta from *Jones*, 526 U.S. 227, discussed above, to reason that "'a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt and jury trial guarantees.'" *Tighe*, 266 F.3d at 1193 (quoting *Jones*, 526 U.S. at 249).

Tighe does not conflict with the California Supreme Court's decision in *Nguyen* in any way that requires this Court's intervention. The Ninth Circuit, acknowledging *Tighe* is not compelled by clearly established law of this Court, denies petitions for habeas corpus raising *Apprendi* challenges to California's Three Strikes law. See *Boyd* v. *Newland*, 467 F.3d 1139, 1152 (9th Cir. 2006).

4. Five other federal circuits reject *Tighe* and hold that nonjury juvenile adjudications are competent proof of recidivism. See *United States* v. *Matthews*, 498 F.3d 25, 35 (1st Cir. 2007); *United States* v. *Jones*, 332 F.3d 688, 696 (3rd Cir. 2003); *United States* v. *Crowell*, 493 F.3d 744, 749-51 (6th Cir. 2007); *United States* v. *Smalley*, 294 F.3d 1030, 1033 (8th Cir. 2002); *United States* v. *Burge*, 407 F.3d 1183, 1187-1191 (11th Cir. 2005).

5. Like the California Supreme Court, most state supreme courts considering the issue have found no constitutional barrier to the use of nonjury

juvenile adjudications as sentencing factors. See *Ryle* v. *State*, 842 N.E.2d 320, 321-23 (Ind. 2005); *State* v. *Hitt*, 273 Kan. 224, 42 P.3d 732, 740 (2002); *State* v. *McFee*, 721 N.W.2d 607, 615-18 (Minn. 2006); and *State* v. *Weber*, 159 Wash. 2d 252, 255, 149 P.3d 646, 649-53 (2006).

In *State* v. *Harris*, 339 Ore. 157, 118 P.3d 236, 238-46 (2005), the Oregon Supreme Court held juvenile adjudications can increase sentences for adult felons so long as a jury is available to find the prior juvenile adjudication in the current case. Given sections 1025 and 1158, California's Three Strikes law would satisfy the Oregon Supreme Court's requirements.

6. In the teeth of an array of federal and state decisions contrary to his position, petitioner places principal reliance on *State* v. *Brown*, 879 So. 2d 1276, 1281-90 (La. 2004). See, *e.g.*, Pet. at 17-18. However, the Louisiana Supreme Court there found juvenile adjudications not to constitute an adjudication of crime as a matter of state law. In light of the Louisiana Constitution's requirement of the right to a jury trial as a prerequisite to a criminal conviction, the court stated "[i]t would be incongruous and illogical to allow the non-criminal adjudication of a juvenile delinquent to serve as a criminal sentencing enhancer." *Brown*, 879 So. 2d at 1289. *Brown*'s reasoning is, of course, not a representation of the Louisiana Supreme Court's view of the Sixth and the Fourteenth Amendments.

7. Repudiating petitioner's primary argument for certiorari, this survey reflects no significant conflict among the federal or state supreme courts on the question presented. For many years, nonjury juvenile adjudications have been deemed constitutionally valid indicators of an adult criminal defendant's recidivist behavior by federal and state

courts. See *Consideration of Accused's Juvenile Court Record in Sentencing for Offenses Committed as an Adult*, 64 A.L.R. 3d 1291 (1975) (the practice of considering prior juvenile adjudications at sentencing has long been accepted); 18 U.S.C. § 5038(a)(2) (considering juvenile adjudications at sentencing authorized by the Federal Youth Corrections Act); see also *Oregon* v. *Ice*, __ U.S. __, 129 S. Ct. 711, 713 (2009) (in deciding whether *Apprendi* should be extended, Court considers "[t]hese two considerations—historical practice and respect for state sovereignty"). The California Supreme Court's judgment in *Nguyen* represents no breach in Sixth Amendment jurisprudence, but rather a reaffirmation of established principles found in numerous earlier decisions of federal and state courts.

8. Equally as important, any variance between lower courts' views on this issue cannot be resolved effectively here in light of distinguishing features of California law. Notably, *Tighe*, *Smalley*, *Jones*, *Burge*, and *Crowell* concerned sentencing under the Armed Career Criminal Act. 18 U.S.C. § 924(e) ("ACCA"). That statute, unlike California law (see §§ 1025, 1158), provides no right to a jury trial on the question of whether the defendant has suffered a prior conviction used to enhance the sentence. Just as no jury right attaches to an allegation of a prior juvenile adjudication used for sentence enhancement in those federal circuit decisions, no right to jury trial on the fact of a prior juvenile adjudication exists under the laws upheld in the cited state supreme court decisions.

To the extent any tension appears among the decisions, it principally concerns not whether a prior juvenile adjudication is competent proof of recidivism, but whether a criminal defendant has the

right to a jury determination of the fact of a prior juvenile adjudication. Because petitioner enjoyed a jury-trial right on precisely that issue, certiorari in this case would not resolve those tensions.

More generally, state-created jury trial rights like California's are both unique and obviate concerns over the use of prior juvenile adjudications to enhance criminal sentences. The question presented seems more naturally and cleanly decided in cases from jurisdictions not affording such a right to criminal defendants.

IV. THE DUE PROCESS CLAIM, THAT FELONS WITH PRIOR WARDSHIP ADJUDICATIONS FOR VIOLENT OR SERIOUS FELONIES ARE TREATED UNFAIRLY BY THE THREE STRIKES LAW, DOES NOT WARRANT CERTIORARI

1. Petitioner asserts that California dealt with him unfairly by considering his prior wardship adjudication as evidence of his recidivism. He avers: "To provide minors with fewer procedural safeguards in the name of rehabilitation and then to use adjudications so obtained to punish them more severely as adults would be 'contradictory and fundamentally unfair.' [Citations.]" Pet. at 25-26; see also Pet. at 35 ("The application of habitual offender statutes to juveniles is unfair because this Court has recognized that they are 'categorically less culpable than the average criminal'"). To the extent petitioner seeks to frame a Fourteenth Amendment Due Process claim, he provides no basis for certiorari.

2. The Court has "'defined the category of infractions that violate "fundamental fairness" very narrowly' based on the recognition that, '[b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation.'

[Citations.]" *Medina* v. *California*, 505 U.S. 437, 443 (1992). In an earlier wardship case, the State deemed petitioner fit to be dealt with under the juvenile court law, rather than under the criminal law, for his commission of a serious felony. That was no assurance the resulting wardship adjudication could never be used to increase punishment in criminal court if petitioner as an adult reoffended.

Nor did the State assure petitioner that his wardship adjudication would not be deemed criminal in nature. California's Three Strikes law was enacted by legislation and voter initiative in 1994. See *People* v. *Hazelton*, 14 Cal. 4th 101, 104-05, 926 P.2d 423, 424-25 (1996). The law increases the maximum sentence for a felony offense upon proof that the defendant has suffered one or more qualifying "prior felony convictions"—a term that specifically includes certain wardship adjudications for felony sustained by a minor sixteen years or older under the juvenile court law. §§ 667(d)(3), 1170.12(b)(3); *Nguyen*, 46 Cal. 4th at 1010, 209 P.3d. at 947.

Petitioner committed the felony that led to his juvenile wardship adjudication in 1999. C.T. 6-8. The Three Strikes law was an established part of California law and clearly stated that a juvenile wardship adjudication for a violent or serious felony can be used as a strike under circumstances specified in that law. §§ 667(d)(3), 1170.12(b)(3). Thus, California broke no guarantee to petitioner that his juvenile wardship adjudication would not be deemed evidence of recidivism in criminal court.

The State has dealt with wards like petitioner fairly. As an adult, petitioner has forsaken the leniency shown him earlier by the juvenile court—thus subjecting himself to the laws attendant to the criminal court, including the Three Strikes law. If

any representation was made to petitioner in his juvenile case respecting recidivism, it was that the adjudication *could* be used to subject him to a harsher adult sentence if he reoffended because his wardship was for a serious felony meeting the definition of a strike.

3. Just as the State never promised continued lenient treatment to petitioner if he reoffended as an adult, no evidence exists that the use of his wardship adjudication as proof of recidivism works unfairness. The state is not punishing petitioner more harshly for his *juvenile offense*. The Three Strikes law imposes no punishment for past juvenile conduct, only for the *current crime*, due to the felon's habitual criminality. As the California Supreme Court explains:

> If the *parens patriae* features of the juvenile justice system have succeeded in rehabilitating a youthful offender, all well and good. But if the person was not deterred, and thus reoffends as an adult, this recidivism is a highly rational basis for enhancing the sentence for the adult offense

Nguyen, 46 Cal. 4th at 1023, 209 P.3d at 956.

4. *Nguyen* rejected a free-standing due process challenge to the Three Strikes law. The court correctly found that the claim is based on state statutory law, not on federal constitutional grounds. It also found that the argument ignores the clear intent of the People of California, expressed through the adoption of the Three Strikes law, to consider certain specified juvenile adjudications as evidence of recidivism making the recidivist subject to harsher punishment.

> Amici curiae . . . argue that to allow the use of juvenile adjudications to enhance later adult sentences "is inconsistent with the purpose of juvenile court and disregards California's carefully drawn boundaries between juvenile and adult court jurisdiction." This argument, essentially based on nonconstitutional state law, overlooks the express provision in California's Three Strikes law that certain serious prior juvenile adjudications shall be deemed "prior convictions" available for adult sentence enhancement. (§§ 667, subd. (d)(3), 11070.12, subd. (b)(3).)

Nguyen, 46 Cal. 4th at 1025 n.12, 209 P.3d at 958 n.12. As a state law claim, petitioner's "fairness" challenge is not cognizable and provides no basis for certiorari.

5. Even if viewed as a constitutional due process argument, petitioner's claim provides no sound basis for certiorari. "The Bill of Rights speaks in explicit terms to many aspects of criminal procedure, and the expansion of those constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order." *Medina*, 505 U.S. at 443. Hence, the Due Process Clause is violated only if the state procedure "'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental.'" *Id.* at 446 (citing *Patterson* v. *New York*, 432 U.S. 197, 202 (1977)).

Petitioner fundamentally rests his challenge to the use of prior wardship adjudications as proof of

recidivism in criminal cases on the particularized statutory rehabilitative goals underlying a wardship adjudication. Undoubtedly, the goal of rehabilitation and reformation of the individual is one reason, among others, justifying the nonjury feature of a wardship adjudication. That wardship adjudications further the goal of rehabilitation, however, does not mean that they are incompetent proof of recidivism when the defendant fails to take advantage of the leniency offered and reoffends. A grant of probation also carries with it the goal of rehabilitation. Yet, it cannot be said that it offends due process to consider a defendant's failure under such a rehabilitative program in evaluating an appropriate sentence in a later criminal case. Both the juvenile and probation systems provide benefits for those who are successful and fulfill the promise for which the systems are designed. The rehabilitative goal of the systems, however, does not insulate the underlying criminal conduct from future scrutiny when the defendant fails to meet that goal.

As this claim falls well outside both the jurisprudence of this Court and the recognized restrictions placed on the States by the Due Process Clause, and there is no conflict of decisions concerning the point, certiorari is unnecessary.

V. PETITIONER'S ADMISSION OF THE STRIKE OFFENSE IN JUVENILE COURT RENDERS CERTIORARI INAPPROPRIATE

1. In *Blakely*, 542 U.S. 296, this Court held that the statutory maximum for *Apprendi* purposes is the maximum sentence that a court can impose without finding any additional facts. *Id.* at 303-04. Juries, and not judges, must determine additional facts that could permit a sentence above the standard range for a particular offense. The Court noted, however, that

a defendant may admit those facts, thereby waiving his *Apprendi* rights. "When a defendant pleads guilty, the State is free to seek a judicial sentence enhancement so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding." *Id.* at 310; see also *id.* at 303 ("the 'statutory maximum' sentence for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant"); *Apprendi*, 530 U.S. at 488 (noting that Almendarez-Torres failed to challenge the accuracy of the prior conviction allegations, alleviating the constitutional tension that might otherwise exist by the use of his priors to enhance his sentence had the facts been contested).

2. Here, petitioner admitted in the juvenile court the conduct alleged in the juvenile delinquency petition. *Nguyen*, 46 Cal. 4th at 1013, 209 P.3d at 949 ("The court file in the 1999 juvenile matter indicates, among other things, that the defendant there admitted to a violation of section 245, subdivision (a)(1)".)[6] Thus, he admitted the relevant facts of the serious felony offense were those alleged by the State.

3. Petitioner asserts that this Court should disregard his admission because he did not have a jury-trial right to waive when he admitted the

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[6] As stated, *ante*, n.2, because the documents submitted to prove petitioner's prior juvenile adjudication became unavailable, the California Court of Appeal "took judicial notice of the juvenile court file." *Nguyen*, 46 Cal. 4th at 1013, n.4, 209 P.3d at 1013, n.4. As petitioner did not move to make the juvenile court file a part of the record on appeal (and respondent does not have a copy of it), the record deficiency, and any questions it may leave unanswered regarding the juvenile court proceedings, reinforces the unsuitability of this case for certiorari.

allegation in the California Juvenile Court. Pet. at 27-28. Petitioner also suggests that a juvenile's admission of criminal conduct "is arguably less reliable" than an adult's. Pet. at 29. His contention unjustifiably overlooks his waiver of his constitutional rights to a contested factual hearing before entering his admission in the juvenile proceeding—a proceeding that meets all constitutional requirements for a valid judgment.

Petitioner's admission of the allegation released the prosecution in the juvenile-court proceeding from the obligation of proving the truth of the conduct underlying the adjudication. That constitutionally established the fact of a prior conviction qualifying as a strike in the instant criminal case. Petitioner should not be heard to claim this Court must ignore his admission some five years ago and now require the prosecution to prove the conduct underlying his juvenile adjudication in a separate trial in criminal court that is neither designed nor intended for that purpose. Notwithstanding petitioner's admission of the allegation, California provided him an opportunity to challenge the juvenile court's adjudication of wardship by direct appeal. See Cal. Welf. & Inst. Code § 800. Petitioner cannot be allowed to wait until the juvenile adjudication is alleged as a recidivist factor before challenging its validity. Cf. *Custis* v. *United States*, 511 U.S. 485, 486 (1994) (with the sole exception of convictions obtained in violation of the right to counsel, a defendant in a federal sentencing proceeding has no right to collaterally attack the validity of previous state convictions used to enhance an ACCA sentence).

Petitioner not only had admitted the underlying conduct alleged in juvenile court, he has waived his statutory right to a jury trial on the issue of his prior

wardship adjudication in criminal court. Petitioner has waived any jury-trial right that *Apprendi* might afford as a prerequisite to the use of his prior juvenile adjudication to increase his sentence. Thus, certiorari in this case is unwarranted.

VI. CERTIORARI SHOULD BE DENIED BECAUSE A SENTENCE REDUCTION IS IMPROBABLE UNDER CALIFORNIA'S REFORMED SENTENCING LAW

1. Petitioner's current sentence is below the statutory maximum for the crime he committed. The improbability of a favorable ruling benefiting him further supports the denial of certiorari.

2. When petitioner was sentenced, the prison terms available for possession of a firearm by a felon were sixteen months, two years, or three years. §§ 18, 12022.1(a)(1); see also *Nguyen*, 46 Cal. 4th at 1014, 209 P.3d at 950. The trial court chose the low term—sixteen months—and doubled it to thirty-two months based on the prior strike under the Three Strikes law. *Nguyen*, 46 Cal. 4th at 1014, 209 P.3d at 949-50.

Petitioner was sentenced in 2005 under California's original determinate sentencing scheme in which the middle term was the presumed maximum term. See *Nguyen*, 46 Cal. 4th at 1014, n.6, 209 P.3d at 950, n.6. After *Cunningham* v. *California*, 549 U.S. 270 (2007), the California Legislature amended the sentencing scheme to eliminate that presumption and to grant the trial court discretion—considering aggravating and mitigating circumstances—to select among the three terms specified by statute for the offense. See *People* v. *Sandoval*, 41 Cal. 4th 825, 843-45, 161 P.3d 1146, 1158-59 (2007). Under *Sandoval*, the maximum term

for *Apprendi* purposes in cases like petitioner's is three years, not two years.

3. Were petitioner to succeed in this Court, his case would be remanded for resentencing. Consistent with *Apprendi* and *Sandoval*, the California Superior Court could rely on petitioner's juvenile court record under the Three Strikes law to reimpose the doubled mitigated term of 32 months because that sentence is below the three-year maximum for the crime of which petitioner was convicted. Cf. *United States* v. *Booker*, 543 U.S. 220 (2005) (permitting enhancements based on judge-found facts with advisory federal sentencing guidelines).

For this additional reason, petitioner's case is a poor vehicle to resolve the sentencing claim he presents.

CONCLUSION

The petition for writ of certiorari should be denied.

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Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
GERALD A. ENGLER
Senior Assistant Attorney General
DONALD E. DE NICOLA
Deputy State Solicitor General
RENÉ A. CHACÓN
Supervising Deputy Attorney General
LAURENCE K. SULLIVAN
Supervising Deputy Attorney General
Counsel of Record
ERIC D. SHARE
Deputy Attorney General

Counsel for Respondent

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